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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re JUAN T., a Person Coming Under the
Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

NATIVIDAD P.,

Defendant and Appellant.

D049850

(Super. Ct. No. NJ12869D)

APPEAL from orders of the Superior Court of San Diego County, Michael J.
Imhoff, Commissioner. Affirmed.

Natividad P. appeals orders adjudicating her infant son, Juan T., a dependent child of the juvenile court and removing him from her custody. Natividad contends the jurisdictional and dispositional orders were not supported by substantial evidence, and the court did not consider lesser alternatives to removing Juan from her custody.

FACTS

In addition to Juan, Natividad had three older children: David H., Stephanie T., and Jennifer T. On July 1, 2004, the San Diego County Health and Human Services Agency (Agency) filed dependency petitions on behalf of Stephanie, then four years old, and Jennifer, then three years old, alleging they were at substantial risk of harm because they were exposed to domestic violence in the home. (Welf. & Inst. Code,¹ § 300, subd. (b).) On July 6, Agency filed a dependency petition on behalf of David, then 13 years old, with the same allegation.

The juvenile court sustained the petitions, declared the children dependents of the court, removed them from parental custody and ordered Natividad and the stepfather/father to comply with their case plans. Natividad and the stepfather/father made little progress with their case plans during the children's dependency cases. In February 2005, the stepfather/father was arrested after he pushed Natividad. The court terminated reunification services at the 18-month review hearing on April 13, 2006.²

A week earlier, Juan was born. After Natividad brought Juan home from the hospital, his father verbally abused Natividad. In late May, Natividad moved into the maternal aunt's home with Juan. The maternal aunt reported the verbal abuse to Agency.

On June 13, 2006, a social worker interviewed Natividad and observed her feeding formula to Juan. Juan appeared healthy. Natividad said Juan's father was not supporting

¹ All statutory references are to the Welfare and Institutions Code.

² The father of Stephanie, Jennifer and Juan, who is also the stepfather of David, is not a party in this appeal.

the child financially. The social worker advised Natividad to file a restraining order against the father, but she refused. Natividad told the social worker that on the advice of her attorney she had left Juan's father in an attempt to regain custody of her three older children. Natividad was not sure about the future of her relationship with Juan's father, but she planned to see him outside the maternal aunt's home. According to the social worker in David's dependency case, Natividad had a history of leaving the father and then returning to him.

On June 27, 2006, Agency removed Juan from Natividad's care and, on the following day, filed a dependency petition on his behalf, alleging his parents, after 18 months of services, had failed to reunify with the three older siblings, which left Juan at substantial risk of serious physical harm. (§ 300, subd. (b).)

Agency recommended no services be offered to the parents because of the lack of progress in dealing with their domestic violence behavior. The social worker noted that Natividad's former therapist stopped seeing her after 10 months because she made "little to no progress." The therapist opined that Natividad did not understand why her children were removed from her and did not take any responsibility for remaining in a violent relationship with the father. The therapist noted that Natividad had low cognitive development, and she had difficulty understanding concepts.³

³ A psychologist who evaluated Natividad in late 1995 reported that Natividad scored within the borderline range of intellectual ability on standardized testing and some of her responses to other testing indicated her intellectual functioning may be higher. However, the psychologist opined that Natividad was unable to make decisions on her own. The psychologist's prognosis for Natividad to be able to independently parent her children and provide them with a stable and protective environment was guarded.

Natividad told the social worker that domestic violence occurred throughout her seven-year relationship with the father. Natividad acknowledged that her oldest child, David, sometimes had to intervene.

By September 2006, Natividad had not reinitiated therapy; she claimed the demands of a new job prevented her from doing so. Natividad continued to attend her domestic violence treatment group, but the group facilitator reported that in the nearly two years of participation, Natividad made minimal or no progress. The group facilitator offered to assist Natividad when she expressed a desire to divorce the father, but Natividad never followed through.

The social worker reported that Natividad was following the same pattern that she had in the older children's dependency cases – missing visits with Juan, which caused the visitation center to cancel its involvement. According to the social worker, Natividad expressed ambivalence about participating in services.

On September 28, 2006, Natividad's parental rights to Stephanie and Jennifer were terminated.⁴ The court granted Agency's request to take judicial notice of the findings and orders in the siblings' dependency cases.

Juan's contested jurisdictional hearing took place on three days between October 20 and November 6, 2006.

Social worker Johanna Firth, who was assigned to the case in June 2006, testified that even though Natividad continued to reside at the maternal aunt's home and there

⁴ Earlier, the court selected another planned permanent living arrangement as David's permanent plan.

were no known physical altercations there, Juan was still at risk. Firth believed Natividad continued to be attached to Juan's father, and neither of them had made progress in the prior case. Furthermore, Natividad continued to focus on her relationship with Juan's father – she was upset that he had a new girlfriend – and remained in contact with him.

Firth testified that Natividad had recently enrolled in a parenting class and began seeing a therapist. Previously, Natividad had refused to attend parenting classes. Natividad had recently decided to change her domestic violence treatment program. Firth said Natividad in the past had used the excuse of having a new job for missing services and visits, but she had not started the job at that time.

Natividad testified she did not live with Juan's father and saw him only at court hearings. Natividad saw him at a bus stop occasionally, but they were unplanned encounters. Natividad also saw him twice while she was walking to the paternal aunt's home to visit her daughters and he was outside. These two encounters also were unplanned.

Natividad said her previous domestic violence treatment program was not helpful because the facilitator made her feel there was no hope. Since her recent enrollment in a new program, Natividad said she was learning how to recognize red flags and how to defend herself.

Natividad denied there was any violence between her and Juan's father other than the 2004 incident. She denied the 2005 incident and being verbally abused by Juan's father shortly after Juan's birth. Natividad said she left Juan's father one month after Juan's birth because she was angry that he did not spend enough time at home. Natividad

believed the social worker removed Juan from her custody because she did not seek a restraining order. Natividad did not believe a restraining order was necessary because she no longer was with Juan's father.

On November 6, 2006, the court sustained the petition.

At the dispositional hearing on November 7, 2006, social worker Firth testified Natividad had completed four therapy sessions, eight parenting classes, and five weeks of domestic violence treatment in the new program. According to Firth, Natividad did not participate in any services between November 2005 and mid-July 2006, despite receiving referrals. The paternal aunt, whom Agency was evaluating for the adoption of Stephanie and Jennifer, was willing to take Juan into her home and adopt him, if it became necessary.

Carmen S., the maternal aunt, testified that Natividad had been living with her since late May 2006. Carmen said Juan's father had never been to her home and she would not allow him there. Carmen said she would tell the social worker if there was any domestic violence between Natividad and Juan's father. Carmen was willing to supervise visits between Natividad and Juan, and to have Juan placed in her home.

Maria T., the paternal aunt, testified she wanted Juan placed in her home and was willing to adopt him along with his older sisters. Maria also was willing to supervise visits between Natividad and Juan.

The court declared Juan a dependent child of the court, removed him from Natividad's custody under section 361, subdivision (c)(1), and placed him in the maternal aunt's home pending a favorable home evaluation. The court ordered Agency to provide

Natividad reunification services and authorized her to reside in the maternal aunt's home on the condition that the aunt supervise Natividad's contact with Juan outside the home. The court further ordered that Juan was to be placed with the paternal aunt if the maternal aunt's home is not approved. The court ordered Agency not to provide reunification services to Juan's father under section 361.5, subdivision (b)(10), (11) and (13).

DISCUSSION

I. Substantial Evidence Supported the Jurisdictional Finding

Natividad contends the court's jurisdictional finding under section 300, subdivision (b) was not supported by substantial evidence because there was no current risk to Juan. The contention is without merit.

In a dependency proceeding, the child welfare agency must prove by a preponderance of the evidence that the child who is the subject of the petition comes under the court's jurisdiction. (§ 355; *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 248; *In re Amy M.* (1991) 232 Cal.App.3d 849, 859-860.)

Section 300, subdivision (b) provides that jurisdiction may be assumed if:

"The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent . . . to adequately supervise or protect the child, or the willful or negligent failure of the child's parent . . . adequately supervise or protect the child from the conduct of the custodian with whom the child has been left, or by the willful or negligent failure of the parent . . . to provide the child with adequate food, clothing, shelter or medical treatment"

"[D]omestic violence in the same household where children are living is neglect; it is a failure to protect [them] from the substantial risk of encountering the violence and suffering serious physical harm or illness from it. Such neglect causes the risk." (*In re*

Heather A. (1996) 52 Cal.App.4th 183, 194.) Domestic violence also adversely impacts children, even if they are not the ones being physically hurt, "because they see and hear the violence and the screaming." (*Id.* at p. 192.) Noting "'children are affected by what goes on around them as well as what is directly done to them,'" the appellate court said children who are exposed to domestic violence can suffer a form of "secondary abuse," which is akin to battered women's syndrome. (*Id.* at p. 195.) This secondary abuse may plant in children the seeds of a psychological predisposition to be victims of domestic violence. (*Id.* at pp. 195-196.)

Other courts have recognized that physical abuse between adults in a home is harmful to the children who live there. (See *In re Sylvia R.* (1997) 55 Cal.App.4th 559, 562.) As one court aptly put it, "[b]oth common sense and expert opinion indicate spousal abuse is detrimental to children." (*In re Benjamin D.* (1991) 227 Cal.App.3d 1464, 1470, fn. 5.)

The juvenile court need not wait until a child is seriously abused or injured to assume jurisdiction and take steps necessary to protect the child. (*In re Michael S.* (1981) 127 Cal.App.3d 348, 357-358; *In re Luwanna S.* (1973) 31 Cal.App.3d 112.) Accordingly, the court may consider past events in deciding whether a child presently needs the court's protection. (*In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1136, overruled on another ground in *Renee J. v. Superior Court* (2001) 26 Cal.4th 736, 748, fn. 6; see also *In re Petra B.* (1989) 216 Cal.App.3d 1163, 1169.)

We review the evidence most favorably to the court's order – drawing every reasonable inference and resolving all conflicts in favor of the prevailing party – to

determine if it is supported by substantial evidence. (*In re Shelly J.* (1998) 68 Cal.App.4th 322, 329.) If it is, we affirm the order even if other evidence supports a contrary conclusion. (*In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610.) On appeal, the parent has the burden of showing there is insufficient evidence to support the order. (*In re Geoffrey G.* (1979) 98 Cal.App.3d 412, 420.)

The record contains substantial evidence supporting the jurisdictional finding under section 300, subdivision (b) that Juan was at substantial risk of serious harm. The history of domestic violence between Natividad and Juan's father, the parents' lack of progress during 18-months of services aimed at reducing their propensity to engage in domestic violence, and Natividad's inability to permanently end her relationship with Juan's father constituted substantial evidence that Juan needed the protection of the juvenile court.

Neither parent had done well with their reunification services during the dependency cases of David, Stephanie and Jennifer. Natividad continued to deny and/or minimize the documented violence and verbal abuse that Juan's father had inflicted upon her in the past. The court properly could consider Natividad's minimization and denial of the protective issues in determining the risk to Juan. (See *In re Esmeralda B.* (1992) 11 Cal.App.4th 1036, 1044.)

Even though Natividad and Juan's father no longer lived together, in the past when they had separated they later reunited and engaged in further domestic violence. Sometimes Natividad said she moved to her sister's home in May 2006 because her attorney told her it would increase her chances of reunifying with Juan's older siblings

and other times she said she did so because Juan's father did not spend enough time at home. Furthermore, Natividad refused to file a restraining order after the social worker advised her to do so, and did not accept offers of assistance to pursue a divorce from Juan's father.

"[T]he question under section 300 is whether circumstances at the time of the hearing subject the minor to the defined risk of harm.' [Citation.] '[P]ast conduct may be probative of current conditions' if there is reason to believe that the conduct will continue." (*In re S.O.* (2002) 103 Cal.App.4th 453, 461, quoting *In re Rocco M.* (1991) 1 Cal.App.4th 814, 824.) The evidence before the court gave rise to a reasonable inference that the domestic violence that put Juan's sisters and his stepbrother at a substantial risk of harm was likely to continue with Juan absent intervention by the juvenile court. Substantial evidence supported the jurisdictional finding under section 300, subdivision (b).

II. Dispositional Order Was Proper

Natividad contends there was insufficient evidence to support the removal of Juan from her custody, and the juvenile court failed to consider less drastic alternatives to removal. The contention is without merit.

After the juvenile court finds a child to be within its jurisdiction, the court must conduct a dispositional hearing. (*Cynthia D. v. Superior Court*, *supra*, 5 Cal.4th at p. 248.) At the dispositional hearing, the court must decide where the child will live while under the court's supervision. (*In re Michael D.* (1996) 51 Cal.App.4th 1074, 1082.)

A removal order is proper if based on proof of parental inability to provide proper care for the child and proof of a potential detriment to the child if he or she remains with the parent. (*In re Jeannette S.* (1979) 94 Cal.App.3d 52, 60.) "The parent need not be dangerous and the minor need not have been actually harmed before removal is appropriate. The focus of the statute is on averting harm to the child." (*In re Diamond H., supra*, 82 Cal.App.4th at p. 1136.) The court may consider a parent's past conduct as well as present circumstances. (*In re Troy D.* (1989) 215 Cal.App.3d 889, 900.)

Before the court issues a removal order, it must find the child's welfare requires removal because of a substantial danger, or risk of danger, to the child's physical health if he or she is returned home, and there are no reasonable alternatives to protect the child. (*In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1654; § 361, subd. (c)(1).) There must be clear and convincing evidence that removal is the only way to protect the child. (See, e.g., *Cynthia D. v. Superior Court, supra*, 5 Cal.4th at p. 248.)

Whether the conditions in the home present a risk of harm to the child is a factual issue. Again, we apply the substantial evidence test. (*In re Kristen H., supra*, 46 Cal.App.4th at p. 1654.)

Substantial evidence supports the juvenile court's decision that removing Juan from Natividad's custody was necessary to protect him from a continuing risk of exposure to domestic violence. In addition to the evidence supporting the jurisdictional finding, the court relied on evidence that Natividad had not grasped the dynamics of domestic violence, as reported by the service providers. Therefore, the court found Natividad had

not ameliorated the domestic violence dynamics in her family. The court also found Natividad had minimized or denied the extent and negative impact of domestic violence on her children. As an example, the court noted David's intervention during altercations between Natividad and Juan's father. The court could reasonably conclude Natividad's inability to understand the dynamics of domestic violence in her relationship with Juan's father and how they adversely impacted her children reflected an underlying resistance to the treatment she needed to change her behavior and provide a safe home for Juan. (*In re Esmeralda B.*, *supra*, 11 Cal.App.4th at p. 1044.)

Although Natividad no longer lived with Juan's father, their continued interaction with each other and her ongoing codependency – she was upset when he had a new girlfriend – presented a substantial risk of future violence in the home. At the same time, the court recognized that, regardless of her motives, Natividad made a positive step when she moved out of the family home and during the preceding six months had shown that she "has the ability to nurture and to raise a child." Indeed, the court largely relied on these factors, as well as others, in rejecting Agency's recommendation that no reunification services be provided to Natividad.

We find the removal order is amply supported by evidence that there was a substantial risk of danger to Juan's safety if he were returned to Natividad's custody at the dispositional hearing. At that time, Natividad had only begun to fully participate in services and it was too early to tell if she was making progress in understanding the dynamics of domestic violence.

Natividad contends there were reasonable alternatives to removing Juan from her custody under section 361, subdivision (c)(1). We disagree.

The court fashioned an unusual removal order by placing Juan in the maternal aunt's home pending a positive home evaluation, and allowing Natividad to reside in the aunt's home under certain conditions. In our view, allowing Natividad to reside in the aunt's home was a reasonable alternative to the usual section 361, subdivision (c)(1) order removing the child from her custody and, if Natividad complied with the conditions, it would enhance her chances of reunification.

Natividad suggests the court could have foregone the removal order and placed Juan with her, order Agency to periodically visit the home, and issue restraining orders against Juan's father. But, Natividad's proposed alternative contemplates her continuing to living in the aunt's home.

In deciding whether to remove a child from home, the child's best interests are paramount. (*In re Corey A.* (1991) 227 Cal.App.3d 339, 346-347.) "The juvenile court has broad discretion to determine what would best serve and protect the child's interest and to fashion a dispositional order in accordance with this discretion." (*In re Jose M.* (1988) 206 Cal.App.3d 1098, 1103-1104.) We discern no abuse of discretion.

DISPOSITION

The orders are affirmed.

IRION, J.

WE CONCUR:

NARES, Acting P. J.

McDONALD, J.